

MONTANA LEGISLATIVE HISTORY

Chapter 222 19 99

Bill H _____ S 240

Original bill & history ☒ c

H. Committee on Transportation

Hearing Date(s) 3/08 ☒ c

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_____ c

Date Out 3/23 c

S. Committee on Business + Industry

Hearing Date(s) 1/27 ☒ c

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Did this bill originate in an interim committee? ☐ Yes ☐ No

Committee _____

Report _____

SENATE BILLS AND RESOLUTIONS

153

1/28	Hearing		
2/10	Committee Executive Action--Bill Passed as Amended	10	0
2/11	Committee Report--Bill Passed as Amended		
2/12	2nd Reading Passed	43	5
2/13	3rd Reading Passed	45	1
	Transmitted to House		
2/16	Referred to Local Government		
3/09	Hearing		
3/12	Committee Executive Action--Bill Concurred as Amended	9	4
3/12	Committee Report--Bill Concurred as Amended		
3/20	2nd Reading Concurred	81	18
3/22	3rd Reading Concurred	74	25
	Returned to Senate with Amendments		
3/25	2nd Reading House Amendments Concurred	50	0
3/26	3rd Reading Passed as Amended by House	49	0
3/26	Sent to Enrolling		
3/29	Returned from Enrolling		
3/29	Signed by President		
3/29	Signed by Speaker		
3/30	Transmitted to Governor		
4/05	Signed by Governor		
4/07	Chapter Number Assigned		
	Chapter Number 261		
	Effective Date: 10/01/1999 - All Sections		

SB 240 Introduced by Grimes

LC0769 Drafter: Niss

Require Government Entity That Withholds from a Construction Contractor Money Owned the Contractor for Construction Services or Materials to Pay Interest to the Construction Contractor;...

1/20	Introduced and 1st Reading		
1/20	Referred to Business and Industry		
1/20	Fiscal Note Requested		
1/25	Fiscal Note Received		
1/27	Hearing		
1/28	Fiscal Note Printed		
2/11	Committee Executive Action--Bill Passed as Amended	7	0
2/11	Committee Report--Bill Passed as Amended		
2/13	2nd Reading Passed as Amended	45	0
2/15	3rd Reading Passed	50	0
	Transmitted to House		
2/16	Referred to Transportation		
3/08	Hearing		
3/15	Committee Executive Action--Bill Concurred	17	0
3/15	Committee Report--Bill Concurred		
3/22	2nd Reading Concurred	93	6
3/23	3rd Reading Concurred	89	8
	Returned to Senate		
3/24	Sent to Enrolling		
3/25	Returned from Enrolling		
3/26	Signed by President		
3/26	Signed by Speaker		
3/29	Transmitted to Governor		

3/31 Signed by Governor
 4/06 Chapter Number Assigned
 Chapter Number 222
 Effective Date: 7/01/1999 - All Sections

SB 241 Introduced by Doherty, et al. *LC0635 Drafter: Sternberg*

Revise the Laws Governing Licenses for Disabled Hunters;...

11/19	Fiscal Note Needed		
1/20	Introduced and 1st Reading		
1/20	Referred to Fish and Game		
1/20	Fiscal Note Requested		
1/26	Fiscal Note Received		
1/26	Fiscal Note Signed		
1/27	Fiscal Note Printed		
2/02	Hearing		
2/15	Committee Executive Action--Bill Passed as Amended	12	0
2/15	Committee Report--Bill Passed as Amended		
2/17	2nd Reading Passed	50	0
2/18	3rd Reading Passed	46	2
	Transmitted to House		
2/20	Referred to Fish, Wildlife, and Parks		
3/02	Hearing		
3/24	Committee Executive Action--Bill Concurred as Amended	18	2
3/24	Committee Report--Bill Concurred as Amended		
3/30	2nd Reading Concurred	80	18
3/31	3rd Reading Concurred	81	17
	Returned to Senate with Amendments		
4/08	2nd Reading House Amendments Concurred	50	0
4/09	3rd Reading Passed as Amended by House	50	0
4/12	Sent to Enrolling		
4/13	Returned from Enrolling		
4/14	Signed by President		
4/15	Signed by Speaker		
4/15	Transmitted to Governor		
4/20	Signed by Governor		
4/22	Chapter Number Assigned		
	Chapter Number 382		
	Effective Date: 10/01/1999 - All Sections		

SB 242 Introduced by Miller, et al. *LC1579 Drafter: B. Campbell*

Allow Only One Apprentice to Work in Each Shop That Employs a Qualified Master Electrician or a Qualified Journeyman Electrician;...

1/20	Introduced and 1st Reading		
1/20	Referred to Labor and Employment Relations		
1/29	Fiscal Note Requested		
2/02	Hearing		
2/02	Fiscal Note Received		
2/04	Fiscal Note Printed		
2/10	Committee Executive Action--Bill Passed as Amended	5	4
2/10	Committee Report--Bill Passed as Amended		
2/11	2nd Reading Passed as Amended	26	24
2/12	3rd Reading Failed	24	26

MINUTES

**MONTANA SENATE
56th LEGISLATURE - REGULAR SESSION
COMMITTEE ON BUSINESS AND INDUSTRY**

Call to Order: By **CHAIRMAN JOHN HERTEL**, on January 27, 1999 at
9:00 A.M., in Room 410 Capitol.

ROLL CALL

Members Present:

Sen. John Hertel, Chairman (R)
Sen. Mike Sprague, Vice Chairman (R)
Sen. Dale Berry (R)
Sen. Vicki Cocchiarella (D)
Sen. Bea McCarthy (D)
Sen. Glenn Roush (D)
Sen. Fred Thomas (R)

Members Excused: None.

Members Absent: None.

Staff Present: Bart Campbell, Legislative Branch
Mary Gay Wells, Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 234, 1/22/1999;
SB 240, 1/22/1999
Executive Action: None

{Tape : 1; Side : A; Approx. Time Counter : 0}

Closing by Sponsor:

SEN. THOMAS closed. If you look at the second page of the bill, line 14, concerning Workmen's Compensation and line 15, stating what they would be allowed to do, this is what the bill is asking for. If you buy the arguments that the opponents bring up here, then you should eliminate the State Fund now. It should not exist. It is competing with the private sector. This bill wants them to be able to offer some services that are related to Worker's Compensation. The University System is an example. They say they don't want to buy from you any more, but we will consider your proposal to manage our claims. What would be wrong with the State Fund from doing that? This bill allows that to happen. Another example might be, a big California company comes into Montana and wants to sell worker's compensation coverage. They do not want to get into it too deeply, but they want to contract with the State Fund. What would be wrong with that? Another example of a trucking firm was given. The market share is shrinking and with that changing market we need to allow the State Fund to make some adjustments as well. They are doing a good job and this bill will let them change to the market that is changing and will allow them to be more competitive and stronger. We can make the Fund a bit more like a business. This makes Montana better and makes Montana more like a business. That is the direction we need to go.

{Tape : 1; Side : A; Approx. Time Counter : 36.4}

HEARING ON SB 240

Sponsor: SENATOR DUANE GRIMES, SD 20, CLANCY

Proponents: Mike Foster, MT Contractors' Assoc.
Dick Anderson, Contractor, Helena
Carl Schweitzer, American Subcontractors Assoc.
of Montana
Zack Pallister, American Subcontractors Assoc.
of Montana, Big Sky Plumbing & Heating, Helena
Joel Wolfe, Polar Electric
Jim Wolfe, Polar Electric
Robert Pierson, Pierson Painting
Tim Crow, Big Sky Sprinklers & Landscaping
Jenny Kalchbrenner, Merit Mechanical Services,
Helena

Opponents: Jim Whaley, Chief, Design Bureau, Administration
Tim Reardon, Chief Counsel, Legal Services
Transportation

Opening Statement by Sponsor:

SENATOR DUANE GRIMES, SD 20, CLANCY. The bill that I have to present this morning, I will turn over to the proponents. The bill clarifies in statute who is entitled to the retainage and the interest. There are some proposed amendments and concerns. I am open to whatever the committee decides.

Proponents' Testimony:

Mike Foster, MT Contractors' Assoc. This bill is brought to you because there has been a problem at various levels of government where there has been some disagreement about who owns the interest on retainage. Sometimes, we have situations where governmental entities will try to keep the interest that should belong to the contractor. In many instances, at some levels of government, that interest is given to the contractor as it rightly should be. If we look at the statutes closely, the statutes do declare that the interest belongs to the contractor. Apparently, there has been some sort of disagreement or lack of communication or understanding. We decided to bring a bill that would clarify that the interest on retainage for construction projects truly does belong to the contractor. Yesterday, we were contacted by Tom O'Connell in the Department of Administration and he had legitimate concerns about the administration of this bill as it is written. We explained that we are not trying to create work for any state or local level of government. We are willing to work with any agencies that have concerns about the administration of this bill. It could require some amendments to the bill. There has been language put forth that would amend it and we are looking at that now. Our initial reaction is that it is good. We are open to suggestion on how to make this work. I was handed considerable amendments just before the hearing from a group of subcontractors. We are willing to talk. We have Dick Anderson, a contractor from Helena, here willing to explain the situation as he understands it.

Dick Anderson, General Contractor, Helena. We are just trying to clarify the bill. When we talked to Tom O'Connell yesterday, he indicated that the way the bill was written it was going to create undue paper work for the state to keep track of the interest for each company. If the state would keep track they could divide the money among the subcontractors. If the state law stays like it is now, what it states is: "I have the right to put up a \$100,000 CD and I would receive the interest on the end of that and they won't retain from me". But I am not going to put my money up and then split it with someone else. There would have to be some way the state could actually put the money into an interest bearing account and at the end we could split it up. The retainage issue is a big problem. We have had excuses that people are on vacation so they weren't able to return our money. We have had checks held up to six months because they haven't had a chance to get to it. They have been too busy. The architect hasn't turned his work in, etc. etc. etc. The money just sits there and I assume they are earning the interest on my money. Our contracts are written with our subcontractors that when we receive our retainage, we pay them. So they are sitting there like we are. The subcontractors say that the general contractor will hold their money beyond that time also. It is a major problem and it would be great if we automatically got interest on it. We just need to clarify the issue.

{Tape : 1; Side : B; Approx. Time Counter : 0}

Carl Schweitzer, American Subcontractors Association of MT. We have some suggested amendments and would like to pass these out to you **EXHIBIT(2)** for your consideration. If this committee will accept the offered amendments, we are in support of this bill. Our amendments can be summed up by the old cliché: What is good for the goose is good for the gander.

When you look at an average construction project, between 80 to 90% of the work is done by subcontractors. Therefore, retainage for work done and the interest that is being earned should be shared by subcontractors. In the bill itself, there is a definition of retainage. Retainage means an amount of money due a contractor and (we have added "or subcontractor") for construction services or materials, or both, that is withheld from payment to the contractor or subcontractor. That means they have done the work, a payment has been made, but a portion of

that payment has been withheld until the whole project has been completed. This bill is divided into two parts.

Look at Section 1. it talks about governmental entities--work that is done on government projects. Look at Section 2. it actually looks like it is talking about work that is done for the private sector construction. Our amendments have been applied to both sections. In both sections we have added a subsection 2. In this subsection it states that the interest accrued in subsection 1 shall be for the benefit of both the general contractor and the subcontractors. We believe that when a subcontractor has retainage withheld, it should also be placed in an interest-bearing account for the benefit of the subcontractor. The new subsection 3 states that the contractor shall insure that the accrued interest is distributed to himself and the subcontractors on a prorata basis. When a payment is made and some retainage is withheld, it needs to be identified that a portion rightfully goes to the general contractor and payment is given from the owner to that general for the subcontractor's work and when that happens and retainage is withheld, at that point in time it should be identified so you know how much interest is going to be earned from that money. Subsection 4 sets parameters of how long a general and subcontractor should have to wait for retainage. This is what Dick Anderson talked about. It seems that from the time the work is completed until the time payment is made it just keeps growing and growing. It creates a cash flow problem for all concerned. In this bill we have tried to put some time frames in for the release of retainage. The time frames would be 45 days after the governmental agency or the owner receives the billing statement or the date the certificate of occupancy is given. Subsection 5 limits the retainage the a general contractor can apply to a subcontractor. When a state project is done, the state in their contract with the general contractor, states that they will retain 10% of the first 50% of the job. With a \$10 million construction project, the general contractor will do 20% and the subcontractors will do 80%. As the work progresses and each payment is made, when the \$5 million mark is reached \$500,000 of that money is put into a retainage account. The remainder will be paid to the contractor and the subcontractors. If the job is going fine, no more money will be withheld as a retainage. So full payment will be made from that time on. The general contractor then tells the subcontractor that he is going to withhold 10% on the entire project. From the general contractor's perspective, when the \$10 million is paid

only 5% is withheld but in essence he is holding an additional 5% from all the subcontractors. We do not think that is fair. Thank you for the opportunity to go through these amendments. There are a number of subcontractors here that would like to speak also.

Zack Pallister, President, Big Sky Plumbing and Heating, Helena. He gave his testimony and handed in the written copy **EXHIBIT(3)**.

Joel Wolfe, President, Polar Electric. I support the bill with the amendments. Retainage is a tough item for all concerned. A good example would be this: you borrow an item, pay with a \$20 bill and instead of receiving change at that moment, the clerk decided to keep it for six months. Six months later you finally get your money. I don't think anyone here would appreciate it and that is the boat we are in all the time. Whether a state or private job, we are still waiting for the payment of our monies. We would appreciate it if you all would support the bill with amendments.

Jim Wolfe, Project Manager, Polar Electric. Many of the problems that we see with general contractors and owners of retainage is that of our profit margin. It sometimes cuts into the overall amount of the cost of the job. So if 10% is being retained from your cash flow and there is only 8% profit in there, you are at a negative 2% at the start. It makes it tough for a general and a subcontractor to manage their cash flow. I stand for the passage of this bill with the amendments.

Robert Pierson, Pierson Painting. We have been in business 27 years in Montana. We employ on average 10 people annually. At any given time we have on average \$50,000 in retainage and that is year around. That is money we could use during the winter time when it is slow. We support **SB 240** with the American Subcontractors Assoc. of MT's amendment.

Tim Crow, Big Sky Sprinklers & Landscaping. We are in a little different situation in our business. During the winter there is little to no work. It seems ridiculous that we should have any receivables on the books. The retainages are always on the books. We do our work and feel that we should be paid when the job is finished. We need that money to invest in capital improvements. We try to keep some employees through the winter

to keep continuity in our business. I support this bill with the amendments.

Jenny Kalchbrenner, Merit Mechanical Services, Helena. She gave her testimony and handed in the written statement **EXHIBIT(4)**.

Opponents' Testimony:

Jim Whaley, Chief, Design Bureau, Administration. As the bill is currently drafted, we need to oppose the bill for two reasons. One, there is currently a mechanism in place that the state does not require schools or local government to follow the statute 18-1-301 MCA. That allows for contractors to submit either a bond or a CD as security deposit and all interest earned off of those CD's go directly to the contractor. It is used generally on larger projects and it is not normally used on small projects. The current statute applies to all construction projects and this bill will create a tremendous burden on us to figure out what the retainage is, what the interest rates are for a given period of time as retainage increases throughout the course of the project and tapers off. It would be an accounting nightmare. The current mechanism in place is simple and workable. I would propose that the language be extended to local government. If we could work out some amendments, we might be able to support the bill.

Tim Reardon, Chief Counsel, Legal Services, Department of Transportation. We are not really an opponent of this legislation, but I would like to present informational testimony. I visited with Mr. Foster before the hearing and there are some questions we have, but I believe we are going to be able to solve most of those that relate to the accounting issues. I would like the committee to consider a provision to allow the enforcement of the action in district court in which the contractor resides. We have a lot of contractors from out of state. If the bill could be amended to allow the bill to read: unless otherwise agreed in writing between the parties, then you could be in the district in which the contractor resides. That would address our concerns.

{Tape : 1; Side : B; Approx. Time Counter : 19.1}

Questions from Committee Members and Responses:

SEN. BEA MCCARTHY asked **Mr. Anderson** that under current law, who earns the interest on the money that is put up as collateral.

Mr. Anderson replied the person who puts up the bond. If I have to take a CD out on a job, I have to use my own money and in that way the owner does not have to hold a retainer because their name and mine are on the CD. I wouldn't have a problem with the subcontractors at that time if each wanted to bring in their portion. **SEN. MCCARTHY** said that the contractor is putting up the total bond and the subcontractors do not put up anything. Would your group like the subcontractors to put up a portion of the bond and then split the interest? **Mr. Anderson** said that if he had a \$100,000 job and if he has to retain \$10,000 and the state retain \$10,000, and if the subcontractor wants the earned interest, he would have to put his share in and the general would not retain.

SEN. MIKE SPRAGUE asked **Mr. Anderson** a question. **Mr. Anderson** said that the committee should be careful not to confuse a bond with retainage. When a contract is bonded there is no interest. It is just a performance maintenance material bond. The state lets you add to a CD. If you start at zero and they retain \$100,000 of your first pay request; you have to show you have taken out a CD for \$100,000. When it is \$200,000, you have to bring in another CD. Ideally, it would be best if the state would pay us interest. But the retainage is sometimes held forever. **SEN. SPRAGUE** asked if a percentage was built into the price. **Mr. Anderson** said that they were the low bidder on the capital restoration. It is a \$14 million job. They don't have the cash in order to do the project and they will have to borrow money as they go along. He would love to say they had 10% on this job. He felt they were in on that job at 5%. Between the subcontractors and himself, they are going to help cash flow the state on the job.

SEN. VICKI COCCHIARELLA asked **Mr. Carl Schweitzer** if this bill deals with retainage and not with deposits. **Mr. Schweitzer** said that when a general contractor gets a contract with the state they have one of two options. They have the option of either putting up a CD which is equal to the amount of retainage that would be withheld from them, or they could have retainage withheld. He felt that **Mr. Anderson** was saying that some

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contractors do put up that collateral. However, this bill deals with retainage when it is withheld. That is what they are trying to deal with here. In the other circumstance, when the collateral is put up, the general contractor still does withhold retainage from the subcontractors though none is withheld from him because he has put up the security.

SEN. MCCARTHY asked **Mr. Whaley** about his objection. **Mr. Whaley** wanted an amendment on the bond or the CD and in which section was desirable. **Mr. Whaley** said they would like to eliminate the bulk of the bill as it stands. They would add language to 10-18-103 that would require the contractor to put up a CD or a bond (interest bond). This would be held as security on the retainage. We release the retainage to the contractor.

SEN. MCCARTHY asked **Mr. Foster** what he thought about the previous statements. **Mr. Foster** felt that he needed to visit with more people but his initial reaction was positive. Concerning the amendments from the subcontractors, he felt that he had not had enough time to digest them completely since he had received them a few minutes before the hearing was started. He hoped that all would be able to sit down and come up with an agreement.

{Tape : 1; Side : B; Approx. Time Counter : 29.7}

SEN. JOHN HERTEL asked **Mr. Foster** if he felt that it was possible that a unified amendment could come out of all this. **Mr. Foster** replied "yes," he was hopeful about this.

SEN. DALE BERRY asked **Mr. Foster** what the statute allowed on the retainage and is there anything in the statute that puts a limit on the time for repayment. **Mr. Foster** said that was a good question and he didn't have an answer at this time. **Mr. Whaley** responded that the retainage is held until the work is complete. Generally 10% is withheld on the first part of the project and at the end of the project it is approximately 5%. At the end of the project, the architect and owner walk through the building and identify deficiencies. If there are no deficiencies, the retainage is released. But if not, it is held back until all is settled and finished.

SEN. BERRY then asked that assuming the job is complete and there is nothing left to be done, then should the money be released quickly? **Mr. Whaley** said that is correct.

SEN. MCCARTHY asked **Mr. Anderson** to respond to the above. **Mr. Anderson** said that it is not just the retention at the end of the job. They have been retaining the whole time. You may have a two year job and they have held money from you for two years and if the retainage is not paid promptly after the job is finished you don't have your money and you don't even get the interest. Right now I have three jobs. One is \$8000; one is \$7000; one is \$9000. But it has been over 1½ years and they have not had a chance yet to final everything out for the general contractor. They have said recently they might get to them this spring. If he could even get the interest, he would feel he was getting something out of it.

{Tape : 1; Side : B; Approx. Time Counter : 36.1}

SEN. COCCHIARELLA asked **Mr. Foster** if it was possible that the coffers were empty and it was just an excuse not to pay these retainage fees back. **Mr. Foster** said that might be a possibility. If the money comes out of the contractor's pocket, then there should be money there. But if it is money that the owner was going to pay but holds back, then his people are saying that money should be put into an interest bearing account.

SEN. SPRAGUE asked **Mr. Whaley** if disputes were part of the problem and the contracts were not being paid on time. **Mr. Whaley** said that there is always a contingency amount of money withheld. Projects usually are not perfectly laid out and finished. If an unforeseen condition arises, the contractor is due additional money and therefore a change order is made up. If an amount can be agreed upon, a change order is processed and it is treated as part of the contract. If there is a legitimate dispute, this has to be resolved one way or the other before any payment can be made.

SEN. HERTEL asked **Mr. Reardon** about the kind of paper work that would be involved in his office that this bill would create. **Mr. Reardon** said, in talking with his financial wizards, there is a means to segregate these accounts. There will be more paper work, but it is a doable thing. With the State Funds, they are

invested by the Board of Investments, so there may be a fiscal consideration here. The interest may be going into the General Fund. He was not sure about this though. **SEN. HERTEL** asked how the money was invested now at this time. **Mr. Reardon** said the Board of Investments handles the money.

{Tape : 1; Side : B; Approx. Time Counter : 45.5}

Closing by Sponsor:

SEN. GRIMES closed. Thank you for the great hearing. I hope you can see the necessity of this bill. As you heard, Montana contractors help the public cash flow the job with money that is rightfully theirs. I am suggesting that the contractors and subcontractors get together and work out the amendments and get the amendments back to the committee.

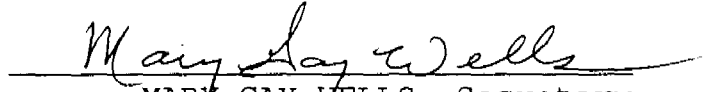
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ADJOURNMENT

Adjournment: 10:40 A.M.


SEN. JOHN HERTEL, Chairman


MARY GAY WELLS, Secretary

JH/MGW

BILL NO. 240 AmendedINTRODUCED BY _____
(Primary Sponsor)

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING THE TRANSPORTATION COMMISSION OR ANOTHER GOVERNMENT ENTITY OR A PRIVATE BUSINESS ENTITY THAT WITHHOLDS FROM A CONSTRUCTION CONTRACTOR MONEY OWED THE CONTRACTOR FOR CONSTRUCTION SERVICES OR MATERIALS TO DEPOSIT THE AMOUNT RETAINED INTO AN INTEREST-BEARING ACCOUNT; REQUIRING THE INTEREST TO BE PAID TO THE CONSTRUCTION CONTRACTOR; PROVIDING FOR ENFORCEMENT; AND PROVIDING AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Retainage to be deposited in interest-bearing account -- interest to be paid to contractor -- enforcement -- definitions.** (1) A government entity that withholds retainage from a contractor in connection with the construction of a building shall deposit the retainage into an interest-bearing account. At the time the entity pays retainage to the contractor, the entity shall also pay to the contractor the interest earned on that retainage.

(2) The interest accrued in subsection (1) shall be for the benefit of the contractor and subcontractors.

(3) The contractor shall ensure that any interest accrued on the retainage is distributed by the contractor to subcontractors on a pro rata basis. The pro rata formula for determining the distribution of interest shall include each subcontractors percentage of the retainage withheld and the length of time the retainage was withheld. With each periodic payment from the governmental entity the contractor shall identify the funds retained from each subcontractor and notify each subcontractor of their retained amount

(4) Any retention proceeds retained or withheld pursuant to this section and any accrued interest shall be released pursuant to a billing statement from the contractor within 45 days of:

- (a) the date the governmental entity received the billing statement from the contractor; or
- (b) the date that a certificate of occupancy is issued.

(5) The retainage percentage withheld by a governmental entity from a contractor is the maximum retainage percentage a contractor can withhold from a subcontractor.

~~(2)~~ (6) The obligation to deposit retainage in an interest-bearing account or to pay interest on

retainage to the contractor and subcontractors pursuant to this section, or both, may be enforced by a civil action in district court in the county in which the contractor or subcontractor resides.

~~(3)~~ (7) The following definitions apply to this section:

(a) "Building" has the meaning provided in 18-2-101(1), except that the term also includes a building owned or to be owned by a county, city, town, or other government entity.

(b) "Construction" has the meaning provided in 18-2-101.

(c) "Government entity" means a department, agency, commission, board, authority, institution, or office of the state, including the board of regents and the Montana university system, a municipality, a county, a consolidated municipal-county government, a school district, or any other special district.

(d) "Retainage" means an amount of money due a contractor or subcontractor for construction services or materials, or both, that is withheld from payment to the contractor or subcontractor.

(e) "Retainage percentage" means the ratio, in percent, of funds retained to the total amount paid to the contractor from the government entity.

NEW SECTION. Section 2. Retainage to be deposited in interest-bearing account -- interest to be paid to contractor -- enforcement -- definitions. (1) ~~A person~~ An owner who withholds retainage from a construction contractor shall deposit the retainage into an interest-bearing account. At the time retainage is paid to the contractor, the ~~person~~ OWNER shall also pay to the contractor the interest on that retainage.

(2) The interest accrued in subsection (1) shall be for the benefit of the contractor and subcontractors.

(3) The contractor shall ensure that any interest accrued on the retainage is distributed by the contractor to subcontractors on a pro rata basis. The pro rata formula for determining the distribution of interest shall include each subcontractors percentage of the retainage withheld and the length of time the retainage was withheld. With each periodic payment from the owner the contractor shall identify the amount of funds retained from each subcontractor and notify each subcontractor of their retained amount.

(4) Any retention proceeds retained or withheld pursuant to this section and any accrued interest shall be released pursuant to a billing statement from the contractor within 45 days of:

(a) the date the owner or owner's representative received the billing statement from the contractor; or

(b) the date that a certificate of occupancy is issued.

(5) The retainage percentage withheld by a owner from a contractor is the maximum retainage

percentage a contractor can withhold from a subcontractor.

~~(2)~~ (6) The obligation to deposit retainage in an interest-bearing account or to pay interest on retainage to the contractor and subcontractors pursuant to this section, or both, may be enforced by a civil action in district court in the county in which the contractor or subcontractor resides.

~~(3)~~ (7) The following definitions apply to this section:

(a) "Construction contractor" has the meaning provided in 39-9-102.

(b) ~~"Person"~~ Owner means an individual, sole proprietorship, partnership, corporation, firm, or other private business entity.

(c) Owner's representative"

means the architect or engineer in charge of the project for the owner or such other contract representative or officer as designated in the contract documents as the party representing the owner's interest regarding administration and oversight of the project.

~~(c)~~ (d) "Retainage" means an amount of money otherwise owed to a construction contractor or subcontractor for construction services or materials, or both, that is withheld from payment to the contractor or subcontractor.

(e) "Retainage percentage" means the ratio, in percent, of funds retained to the total amount paid to the contractor from the owner.

NEW SECTION. **Section 3. Commission to comply with requirements for retainage.** The commission shall, for all contracts let by the commission pursuant to this part, treat retainage, as defined in [section 1], in accordance with the requirements of that section.

NEW SECTION. **Section 4. Codification instruction.** (1) [Section 1] is intended be codified as an integral part of Title 18, chapter 2, part 3, and the provisions of Title 18, chapter 2, part 3, apply to [section 1].

(2) [Section 2] is intended to be codified as an integral part of Title 28, and the provisions of Title 28 apply to [section 2].

(3) [Section 3] is intended to be codified as an integral part of Title 60, chapter 2, part 1, and the provisions of Title 60, chapter 2, part 1, apply to [section 3].

EXHIBIT NO. 3DATE 1-27-99BILL NO. SB 240

Mr. Chairman, members of the committee, thank you for allowing me to express my support today for Senate bill 240 if it is amended to include subcontractors. My name is ZACH PALLISTER. I am president of Big Sky Plumbing and Heating here in Helena and I am also here today as President of the American Subcontractors Association of Montana representing all of the subcontractors of this great state.

Thousands of
Subcontractors generally make up 80-90 percent of the workforce on any given public works or private project as Mr. Schweitzer just pointed out in his presentation. We feel that unless amended, this bill does not provide any fairness to subcontractors. Too often the subcontractor is made to adhere to subcontract requirements with the general contractor that are unfair or face losing the job. This often includes withholding of retention throughout a project when the general contractor's retention may have been reduced to zero at 50 percent of the project completion. I can even cite cases when a general contractor has withheld retention on subcontractors when the owner on that particular project has not withheld retention on the general contractor.

When we talk of retention, I am sure that most of the general public, including you good people do not realize that when retention is withheld from a contractor, even if he does not receive those retention dollars by the end of a year he will be taxed on those so called earned dollars. For example in 1998, my company ~~Big Sky Plumbing and Heating~~ showed on the books that we had retention in the amount of over four hundred thousand dollars of which we had only collected one hundred fifty thousand dollars. Good old Uncle Sam taxed our company on two hundred and fifty thousand dollars that we had not even received. So you see, not only were we short two hundred fifty thousand dollars but we were also taxed another 80 thousand dollars which means that our cash flow was negative in the amount of 330 thousand dollars at the start of 1999. That is a big hit!

As one of the major mechanical contractors in the state, it is quite often that big sky plumbing in heating is a prime contractor or general contractor on a project. It is not uncommon for us to have five or six or even as many as 8 subcontractors on a project. So to look at this bill from the perspective of the general contractor I do not see any reason why a general contractor who is a professional contractor would have any problem whatsoever with these amendments. It is just not fair that a general contractor is allowed to finance a project by using the money that belongs to subcontractors who are directly responsible for helping him make is living.

The amendments that we're proposing to Senate bill 240 only serve to include subcontractors and to make the bill fair. Our average receipt of retention payment for 1998 was RIDICULOUSLY well over 60 days. *and in some cases several months that the* So obviously we support the idea that retention should earn interest and that the interest should be given to the contractors. However, the definition of a contractor definitely should include subcontractors, because without the support of a subcontractor a general contractor has no assured way to make to make a decent living. *It is not arguable* The livelihood of a general contractor is dependent upon subcontractors, so again please consider the proposed amendments as a means of making this bill fair for all Montana contractors, not just a select few.

Thank you for consideration. I appreciate the time you all spend in your efforts to better Montana. *and I urge you to support SB 240 as amended.*

MR. CHAIRMAN & MEMBERS OF THE COMMITTEE:

my name is Sunny Kalchauer

MY HUSBAND AND I OWN MERIT MECHANICAL SERVICES HERE IN HELENA. WE ARE HEATING/AIR CONDITIONING & ROOFING CONTRACTOR. SENATE BILL 240 AS AMEND IS IMPORTANT TO US BECAUSE EACH YEAR THOUSANDS OF DOLLARS ARE HELD RETAINAGE AND WE SHOULD BE EARNING INTEREST ON OUR MONEY. IN 1998 APPROXIMATELY 250,000 DOLLARS WERE WITHHELD FROM OUR COMPANY AS RETAINAGE FOR AN AVERAGE TIME LENGTH OF 6 MONTHS. MEANWHILE, EMPLOYEES BENEFIT AND ALL OTHER BILLS MUST BE PAID LONG BEFORE ANY RETENTION IS RELEASED ^{as stated by our} ~~other~~ ^{own} ~~our~~ ^{accounting} ~~is~~ ALSO SINCE ~~WE PAY TAXES~~ ON AN ACCURAL BASIS, IN A LOT OF CASES, WE HAV ALREADY PAID BOTH STATE & FEDERAL TAXES ON THE RETAINAGE BEFORE WE RECEIVE IT.

RECEIVING INTEREST ON FUNDS RETAINED ~~FROM US~~ WOULD HELP THE SUBCONTRACTOR SURVIVE THE LONG WAIT FOR THEIR RETENTION.

THANK YOU.

DATE 1-27-99

[illegible]

DATE January 27, 1999

SENATE COMMITTEE ON Business and Industry

BILLS BEING HEARD TODAY: SB 234, SB 240

PLEASE PRINT

NAME	PHONE	REPRESENTING	BILL #	SUPPORT	OPPOSE
Carl Schweitzer		Amer. Sub. Ass. of MT	240	X	
Jim Crowe		Big Sky Sprinklers	240	X	
DAVE GRUBER		GRUBER MASONRY	240	X	
Robert P. Piers		Piersor Painting	240	X	
Thomas Piers		Piers Painting	240	X	
Genny Katchbrenner		Merit Mechanical	240	X	
Mark Barry		MT State Fuel	234	X	
George Wood		MT Self Insurers	234		X
Joe Wolfe		POLAR ELECTRIC	240	X	
Jim Wolfe		POLAR	240	X	
Jerry Dussell		Building Trades Boys	234		X
Joe Wolfe		POLAR ELEC	234	X	
Dick Anderson		Dick Anderson Const.	240	X	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

DATE 1-27-99

SENATE COMMITTEE ON Sen. Bus + Inhofe

BILLS BEING HEARD TODAY: SB 234 + SB 240

PLEASE PRINT

NAME	PHONE	REPRESENTING	BILL #	SUPPORT	OPPOSE
ZACH PALLISTER	443-0336	American Subcontractors	240	X	
SIM WHALEY	444-3106	A/E Mortenson	240	AS amended	
				X	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

1

2 INTRODUCED BY

(Primary Sponsor)

SENATE BILL NO. 240

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING THE TRANSPORTATION COMMISSION OR
5 ANOTHER GOVERNMENT ENTITY OR A PRIVATE BUSINESS ENTITY THAT WITHHOLDS FROM A
6 CONSTRUCTION CONTRACTOR MONEY OWED THE CONTRACTOR FOR CONSTRUCTION SERVICES OR
7 MATERIALS TO DEPOSIT THE AMOUNT RETAINED INTO AN INTEREST-BEARING ACCOUNT; REQUIRING
8 THE INTEREST TO BE PAID TO THE CONSTRUCTION CONTRACTOR; PROVIDING FOR ENFORCEMENT;
9 AND PROVIDING AN APPLICABILITY DATE."

10

11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

12

13 NEW SECTION. Section 1. Retainage to be deposited in interest-bearing account -- interest to
14 be paid to contractor -- enforcement -- definitions. (1) A government entity that withholds retainage from
15 a contractor in connection with the construction of a building shall deposit the retainage into an
16 interest-bearing account. At the time the entity pays retainage to the contractor, the entity shall also pay
17 to the contractor the interest earned on that retainage.

18 (2) The obligation to deposit retainage in an interest-bearing account or to pay interest on
19 retainage to the contractor pursuant to this section, or both, may be enforced by a civil action in district
20 court in the county in which the contractor resides.

21 (3) The following definitions apply to this section:

22 (a) "Building" has the meaning provided in 18-2-101(1), except that the term also includes a
23 building owned or to be owned by a county, city, town, or other government entity.

24 (b) "Construction" has the meaning provided in 18-2-101.

25 (c) "Government entity" means a department, agency, commission, board, authority, institution,
26 or office of the state, including the board of regents and the Montana university system, a municipality,
27 a county, a consolidated municipal-county government, a school district, or any other special district.

28 (d) "Retainage" means an amount of money due a contractor for construction services or
29 materials, or both, that is withheld from payment to the contractor.

30

1 NEW SECTION. Section 2. Retainage to be deposited in interest-bearing account -- interest to
2 be paid to contractor -- enforcement -- definitions. (1) A person who withholds retainage from a
3 construction contractor shall deposit the retainage into an interest-bearing account. At the time retainage
4 is paid to the contractor, the person shall also pay to the contractor the interest on that retainage.

5 (2) The obligation to deposit retainage in an interest-bearing account or to pay interest on
6 retainage to the contractor pursuant to this section, or both, may be enforced by a civil action in district
7 court in the county in which the contractor resides.

8 (3) The following definitions apply to this section:

9 (a) "Construction contractor" has the meaning provided in 39-9-102.

10 (b) "Person" means an individual, sole proprietorship, partnership, corporation, firm, or other
11 private business entity.

12 (c) "Retainage" means an amount of money otherwise owed to a construction contractor for
13 construction services or materials, or both, that is withheld from payment to the contractor.

14

15 NEW SECTION. Section 3. Commission to comply with requirements for retainage. The
16 commission shall, for all contracts let by the commission pursuant to this part, treat retainage, as defined
17 in [section 1], in accordance with the requirements of that section.

18

19 NEW SECTION. Section 4. Codification instruction. (1) [Section 1] is intended be codified as an
20 integral part of Title 18, chapter 2, part 3, and the provisions of Title 18, chapter 2, part 3, apply to
21 [section 1].

22 (2) [Section 2] is intended to be codified as an integral part of Title 28, and the provisions of Title
23 28 apply to [section 2].

24 (3) [Section 3] is intended to be codified as an integral part of Title 60, chapter 2, part 1, and the
25 provisions of Title 60, chapter 2, part 1, apply to [section 3].

26

27 NEW SECTION. Section 5. Applicability. [This act] applies to contracts entered into after October
28 1, 1999.

29

- END -

FISCAL NOTE

Bill #: SB0240

Title: Clarify interest on retainage belongs to contractor

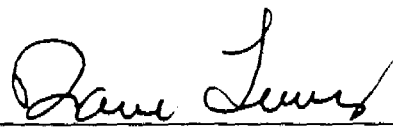
Primary

Sponsor: Duane Grimes

Status: As introduced

Sponsor signature

Date


Dave Lewis, Budget Director

Date

1-23-98

Fiscal Summary

	<u>FY2000 Difference</u>	<u>FY2001 Difference</u>
Expenditures:	\$0	\$0
Revenue:		
General Fund	(\$94,677)	(\$126,235)
State Special Revenue	(95)	(127)
Capital Project Funds	(77,781)	(103,708)
Net Impact on General Fund Balance:	(\$94,677)	(\$126,235)

<u>Yes</u>	<u>No</u>		<u>Yes</u>	<u>No</u>	
	X	Significant Local Gov. Impact	X		Technical Concerns
	X	Included in the Executive Budget		X	Significant Long-Term Impacts

Fiscal Analysis

ASSUMPTIONS:

Department of Transportation:

1. Passage of this bill will require that a separate accounting entity be established that can retain interest earnings to account for contractor retainage.
2. The Board of Investments will invest the monies at the prevailing rates for the short-term investment pool (STIP).
3. The contractor is eligible to receive interest only on the retainage to be paid at the completion of the contract. That is, if the department withholds payment based on noncompliance or nonperformance, the contractor is not eligible to receive the interest earned by that money.
4. The Department of Transportation used an average of FY 1998 balances of contractor retainage for this fiscal note's calculations. (\$2,030,416)
5. An average STIP rate of 5.54% was used.

SB 240

(continued)

6. Revenue loss = \$112,485 annually. ($\$2,030,416 \times 5.54\% = \$112,485$) Due to the October effective date, the impact would only be for 3 quarters in FY 2000.

Long-Range Building Program:

7. All funds are currently invested by the appropriate agency or university (administering agency) in the short-term investment pool (STIP) with the Board of Investments until the retainage is released.
8. Interest rates for the STIP will be 5.54%, based on a 6-month average for the period July through December 1998.
9. The general fund receives the interest earnings for all funds, with the exception of the Long-Range Building Program account and the bond accounts, which retain their interest earnings.
10. There will be approximately \$2,122,480 of retainage being withheld from the contractors at any given point in time, based on December 1998 data.
11. If this bill is passed, the funds that currently receive the interest earnings on the retainage will no longer have access to the funds.
12. The revenue estimates for the 2000-2001 biennium will be overstated for the funds that included the interest earnings in their revenue estimates (e.g., Long-Range Building Program account).
13. This bill applies to contracts entered into after October 1, 1999.

FISCAL IMPACT:

	<u>FY2000 Difference</u>	<u>FY2001 Difference</u>
Department of Transportation:		
<u>Expenditures:</u>	\$0	\$0
<u>Revenues:</u>		
General Fund (01)	(\$84,364)	(\$112,485)
Long-Range Building Program:		
<u>Expenditures:</u>	\$0	\$0
<u>Revenues:</u>		
General Fund (01)	(\$10,313)	(\$13,750)
State Special Revenue (02)	(95)	(127)
Other – CPF (05)	(77,781)	(103,708)
<u>Net Impact to Fund Balance (Revenue minus Expenditure):</u>		
General Fund (01)	(\$94,677)	(\$126,235)
State Special Revenue (02)	(95)	(127)
Capital Projects Funds (05)	(77,781)	(103,708)

TECHNICAL NOTES:

Statute (18-1-301, MCA) presently provides a mechanism for contractors to obtain earnings on their retainage by providing the contracting entity with a form of security (treasury bonds, certificates of deposit, etc.) in lieu of retainage. This allows the contractor to direct the monies in an avenue the contractor views as most appropriate. Presently the Architecture and Engineering Division write contracts with a provision informing all contractors of this option and many have taken advantage of it.

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 56th LEGISLATURE - REGULAR SESSION

COMMITTEE ON TRANSPORTATION

Call to Order: By **CHAIRMAN SHIELL ANDERSON**, on March 8, 1999 at 3:00 P.M., in Room 420 Capitol.

ROLL CALL

Members Present:

Rep. Shiell Anderson, Chairman (R)
Rep. Gary Beck, Vice Chairman (D)
Rep. Rick Jore, Vice Chairman (R)
Rep. Darrel Adams (R)
Rep. Joe Barnett (R)
Rep. Sylvia Bookout-Reinicke (R)
Rep. Matt Brainard (R)
Rep. Paul Clark (D)
Rep. Robert C. Clark (R)
Rep. Steven Gallus (D)
Rep. George Golie (D)
Rep. Marian Hanson (R)
Rep. Donald L. Hedges (R)
Rep. Carol C. Juneau (D)
Rep. Gary Matthews (D)
Rep. Frank Smith (D)
Rep. Roger Somerville (R)
Rep. Cliff Trexler (R)

Members Excused: None.

Members Absent: None.

Staff Present: Leanne Kurtz, Legislative Branch
Mary Lou Schmitz, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 122; SB 240; SB 266; 3/4/99
Executive Action: SB 267; SB 268; TABLED 18-0

Questions from Committee Members and Responses: Reps. Paul Clark, Somerville, Brainard, Anderson, Hanson to Brenda Nordlund and Dean Roberts.

{Tape : 1; Side : A; Approx. Time Counter : 26.2 - 30.4}

{Tape : 1; Side : B; Approx. Time Counter : 0.1 - 10.1}

Closing by Sponsor: Senator Lynch closed the Hearing on SB 266.

{Tape : 1; Side : B; Approx. Time Counter : 10.1 - 10.9}

HEARING ON SB 240

Sponsor: Senator Duane Grimes, SD 20.

{Tape : 1; Side : B; Approx. Time Counter : 10.9 - 13.9}

Proponents: Mike Foster, Montana Contractors' Association.

{Tape : 1; Side : B; Approx. Time Counter : 13.9 - 17.2}

Carl Schweitzer, Subcontractors of Montana.

{Tape : 1; Side : B; Approx. Time Counter : 17.2 - 18.2}

Opponents: None

Questions from Committee Members and Responses: Reps. Golie, Somerville, Smith, Paul Clark, Bookout-Reinicke, Gallus to Mike Foster, Tom O'Connell, Administrator, Architect and Engineering Division, State of Montana, and Senator Grimes.

{Tape : 1; Side : B; Approx. Time Counter : 18.2 - 27.2}

Closing by Sponsor: Senator Grimes closed the Hearing on SB 240.

{Tape : 1; Side : B; Approx. Time Counter : 27.2 - 28}

EXECUTIVE ACTION ON SB 267

Motion/Vote: REP. BOOKOUT-REINICKE moved SB 267 BE TABLED.

Motion carried unanimously 18-0.

{Tape : 1; Side : B; Approx. Time Counter : 28 - 28.2}

EXECUTIVE ACTION ON SB 268

Motion/Vote: REP. BARNETT moved that SB 268 BE TABLED.

{Tape : 2; Side : A; Approx. Time Counter : 0.1 - 0.5}